such prior statements necessarily strengthen his testimony materially. This view is generally sustained by the courts.[12] The view of the majority of the courts has recently been upheld by the case of *People* v. *Katz* (N. Y.), 103 N. E. 305. In that case an accomplice had at the beginning of the trial been promised immunity by the district attorney if he would become a witness against the defendant. To this the accomplice agreed, and at the trial his testimony was impeached by the defense on the ground that he was actuated by motives of self-interest. Evidence was then offered of a statement made by the witness a year before he had been promised immunity by the district attorney, which statement corroborated the testimony given by him at the trial. The court held the prior statement to be admissible. An accomplice is always under suspicion, and it has been said that prior consistent statements made by him cannot be admitted in corroboration of his testimony unless some other principle may be invoked by reason of the impeachment of his testimony.[13] But the courts are divided on this question.[14] In the principle case, however, the prior consistent statements of the witness were admitted because his testimony had been impeached on the ground of interest, and not merely because the witness was an accomplice.

RECOVERY OF MONEY PAID UNDER DURESS.—The rule is settled that money paid under duress can be recovered back; on this point the courts are practically in accord. But, though the rule is an invariable one, its application often gives rise to considerable trouble, for it is frequently difficult to determine whether the circumstances of a particular case constitute duress.

Inasmuch as duress may assume many different forms and be attended by circumstances of a diverse nature, it becomes exceedingly difficult to define it in a satisfactory manner. In a leading case decided by the United States Supreme Court it was said that "To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary, there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the other has no other means of immediate relief than by making the payment." [1] This definition seems to have met with more approval by the courts than any other that has been advanced.

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[12] Griffin *v.* Boston, 188 Mass. 475, 74 N. E. 687; Sweeney *v.* Sweeney, 121 Ga. 293, 48 S. E. 984; French *v.* Merrill, 6 N. H. 465. See, also, Chicago City R. Co. *v.* Matthieson, 212 Ill. 292, 72 N. E. 443.

[13] 2 WIGMORE, EV., 1329.

[14] See State *v.* Callahan, 47 La. Ann. 444, 17 So. 50. A *dictum* in this opinion seems to hold that such testimony is inadmissible. *Contra,* People *v.* Vane, 12 Wend. (N. Y.) 78.

[1] Radich *v.* Hutchins, 95 U. S. 210, 24 L. Ed. 409.

In order to recover back money as paid under duress, the payment must have been made to free the person or property from an actual and existing restraint imposed by the person to whom it is paid, or to prevent the seizure of the person or property by one armed with apparent power or authority to seize.[2] To constitute duress it must be shown that the plaintiff's will was overpowered; a mere reluctance to pay is not enough.[3] Not only must the plaintiff allege and prove duress, but it must be made to appear that the demand was unfounded or illegal; for to enforce or to threaten to enforce a legal right is not duress in the eyes of the law.[4] Nor is the fact that the money was paid under protest alone sufficient to entitle one to recovery. The mere filing of a protest cannot change what would otherwise be in law a voluntary payment into an involuntary one or affect in any way the rights of the parties. The payment nullifies the protest.[5] If there be duress, it seems that the only instances where the formality of a protest is necessary are where illegal exactions are made by officers of the government. There is a *dictum* to the effect that even in this case protest is not necessary if the officer knows that his claim is unfounded.[6]

In the definition of duress given above great importance is attached to the final qualifying clause, "from which the other has no other means of immediate relief than by making the payment." It often happens that the courts afford in the first instance a remedy to the party sought to be coerced. But the circumstances may be such as to render this relief practically worthless; there may be exigencies requiring prompt action on the part of the plaintiff in order to emancipate his person from constraint or to save his property from serious loss. To force him in such cases to resort to the courts instead of permitting him to accede to the illegal demand and later recover back the money would be virtually a denial of justice. This may be illustrated by the case of a mortgagor who to save his property from foreclosure negotiates a loan, the property when released to serve as security for the new loan, and the mortgagee refuses to disencumber it unless a sum in excess of the amount due be paid him as bonus. The mortgagor would be seriously embarrassed if the only available course open to him were to make a tender and then resort to legal action. Again, it frequently occurs that it is necessary for the plaintiff to have control of his property at once in order to dispose of it to advantage. To preclude the existence of duress the legal remedy

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[2] Joannin *v.* Ogelvie, 49 Minn. 564, 52 N. W. 217, 16 L. R. A. 376; Brumagin *v.* Tillinghast, 18 Cal. 265, 79 Am. Dec. 176; Mayor of Baltimore *v.* Lefferman, 4 Gill. (Md.) 425, 45 Am. Dec. 145.

[3] Cantonwine *v.* Bosch Bros., 148 La. 501, 127 N. W. 657; Union Pac. Ry. Co. *v.* Dodge County, 98 U. S. 541.

[4] In re Meyer, 106 Fed. 828; Slover *v.* Rock, 96 Mo. App. 335, 70 S. W. 268.

[5] City of Phœbus *v.* Manhattan Social Club, 105 Va. 144, 52 S. E. 839; City of Detroit *v.* Martin, 34 Mich. 170, 22 Am. Rep. 512.

[6] Meek *v.* McClure, 49 Cal. 623.

must be adequate and reasonably expeditious.[7] But when the law furnishes an available remedy and one that can be utilized without particular inconvenience, then resort to it must be had, otherwise the payment will be considered as voluntary.[8]

As to the degree of constraint and danger necessary to constitute duress, it has been generally held that it must be sufficiently severe to overcome the mind and will of a person of ordinary firmness.[9] But of late years the courts have shown a tendency to reject this test and to adopt a more liberal one, viz., that, since duress is a relative and not an absolute term, the characteristics of the person claiming to have been coerced are a fit subject of inquiry, and that in each individual case the strength of will and the power of resistance possessed by the one seeking relief should be considered. This doctrine has been applied in a number of cases,[10] and it is believed that the future will witness a constantly increasing extension of it. It harmonizes fully with the general policy of the law, which has ever exhibited a tender regard for the incompetent and the defective. The whole underlying basis of the doctrine that relief is to be granted in cases of compulsory payments is founded upon the principle that duress destroys the free agency of the coerced party. It would seem, therefore, to be as harsh as it is unreasonable to apply the same rigid standard to all and to penalize the weak and the timorous for not having opposed to the persuasive force of threatening and coercive measures a degree of fortitude and resolution that nature has denied them or of which they have been deprived by unhappy circumstances.

Duress of person.—The courts are unanimous in holding that a payment made to secure release from an imprisonment that is lawful and unattended with any abuse of process cannot be recovered back.[11] On the other hand, if the arrest be made without just cause, or, though for just cause, without lawful authority, or if an arrest for just cause and under lawful authority be for an improper purpose so as to constitute an abuse of process, then payment to secure release therefrom is considered to be under duress and therefore involuntary.[12] So, of course, money paid to relieve

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[7] Joannin *v.* Ogelvie, *supra;* Lehigh Coal & Navigation Co. *v.* Brown, 100 Pa. St. 338.

[8] Paulson *v.* Barger, 132 Ia. 547, 109 N. W. 1081; New Orleans & N. E. R. Co. *v.* Louisiana Const. & Imp. Co., 109 La. 13, 33 So. 51, 94 Am. St. Rep. 395.

[9] United States *v.* Huckabee, 16 Wall. (U. S.) 414; Morse *v.* Woodworth, 155 Mass. 233, 29 N. E. 525.

[10] Baldwin *v.* Hutchinson, 8 Ind. App. 454, 35 N. E. 711; Cribbs *v.* Sowles, 87 Mich. 340, 49 N. W. 587, 24 Am. St. Rep. 166; Galusha *v.* Sherman, 105 Wis. 263, 81 N. W. 495.

[11] Coveney *v.* Phiscator, 132 Mich. 258, 93 N. W. 619; Meacham *v.* Town of Newport, 70 Vt. 67, 39 Atl. 631; Meek *v.* Atkinson, 1 Bailey (S. C.) 84, 19 Am. Dec. 653.

[12] Richardson *v.* Duncan, 3 N. H. 508; Phelps *v.* Zuschlag, 34 Tex. 371; Fillman *v.* Ryon, 168 Pa. St. 484, 32 Atl. 89; Sweet *v.* Kimball, 166 Mass. 332, 44 N. E. 243, 55 Am. St. Rep. 406; Behl *v.* Schuett, 104 Wis. 76, 80 N. W. 73.

from the detention of a private individual who has no legal authority to hold the plaintiff's person may be recovered back. The weight of authority is to the effect that payments made under void judgments, statutes, or State constitutional provisions in conflict with the federal Constitution may be recovered back if the payment be involuntary.[13]

Duress of personalty.—The rule of the early common law as regards duress was of a much more strict and circumscribed nature than the one prevailing at the present day; for, according to the former doctrine, the scope of duress was confined to duress of the person. But this narrow view gradually began to be displaced by one of greater latitude. The extension of the earlier doctrine has gone forward at such a pace that now relief is granted as readily in cases of personal property as in cases where there has been duress of the person. It is immaterial whether the payer's object be to prevent the unlawful seizure of his personal property or to secure the possession of personal property unlawfully withheld where such detention is accompanied by immediate hardship or irreparable injury.[14] The rule has been extended to include personalty wrongfully seized or threatened to be seized under legal process,[15] and to cover intangible as well as tangible personalty.[16]

Under the head of duress of personalty may be placed a class of cases that are of an anomalous nature. These are cases where the constraint arises out of business necessities, as where a railroad company, whose road is the only outlet to market, refuses to transport goods unless the shipper will pay a rate above the legal rate, or where a person has the alternative of submitting to the illegal exactions of a city or of ceasing to do business within its corporate limits. The weight of authority is to the effect that money paid out under such circumstances may be recovered back,[17] but a few courts have taken a contrary view. Where recourse to the courts in such cases will not furnish an adequate and reasonably speedy remedy or prevent great financial loss, the right to recover on principle is undeniable.

Duress of real property.—It was held in two early New York cases that the principle that money paid to relieve property from

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[13] Harvey *v.* Town of Olnley, 42 Ill. 336; Cunningham *v.* Munroe, 15 Gray (Mass.) 471, 472; Hollingsworth *v.* Stone, 90 Ind. 244.

[14] White *v.* Helyman, 34 Pa. St. 142; Cobb *v.* Charter, 32 Conn. 358, 87 Am. Dec. 178; Scholey *v.* Mumford, 60 N. Y. 498.

[15] Chandler *v.* Sanger, 114 Mass. 364, 19 Am. Rep. 367; Clark *v.* Pearce, 80 Tex. 146, 15 S. W. 787.

[16] Scholey *v.* Mumford, *supra;* McCabe *v.* Shaver, 69 Mich. 25, 36 N. W. 800.

[17] W. Va. Transportation Co. *v.* Sweetzer, 25 W. Va. 434; Swift Co. *v.* United States, 111 U. S. 22; Chase *v.* Dwinal, 7 Me. 134, 20 Am. Dec. 352. But in the recent Virginia case of Va. Brewing Co. *v.* Com., 113 Va. 145, 73 S. E. 454, it was held that a company could not recover back an unlawful license tax exacted by a city as a condition precedent to the beginning of business operations within its limits.

duress can be recovered back does not extend to real estate.[17a] But this doctrine has now no adherents whatever, and no distinctions are made between different kinds of property. Save in a few instances, no courts of late years have even considered the question of making a distinction between realty and personalty; the majority of them proceed on the assumption that the same rule is as applicable to one kind of property as to another and in the proper cases permit without hesitation the recovery of money paid under duress of real estate.[18] The question in each case is, was the payment voluntary? If the court comes to the conclusion that it was not, then the decision will be the same, whether the duress be of the person, of goods and chattels, or of real property.[19]

[17a] Fleetwood *v.* New York, 2 Sandf. (N. Y.) 475; Forrest *v.* New York (Sup. Ct. Spes. T.), 13 Abb. Pr. (N. Y.) 350.

[18] Joannin *v.* Ogelvie, *supra;* Kilpatrick *v.* Germania Life Ins. Co., 183 N. Y. 163, 75 N. E. 1124, 111 Am. St. Rep. 722, 2 L. R. A. (N. S.) 574; Redford *v.* Weller, 27 S. D. 334, 131 N. W. 296.

[19] Joannin *v.* Ogelvie, *supra.*